

NO. 47641-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS' ALLIANCE
FOR PROPERTY RIGHTS JEFFERSON COUNTY, CITIZENS' ALLIANCE
FOR PROPERTY RIGHTS LEGAL FUND, MATS MATS BAY TRUST,
JESSE A. STEWART REVOCABLE TRUST, and CRAIG DURGAN, and
HOOD CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Petitioners,

vs.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and
JEFFERSON COUNTY,

Respondents.

and

HOOD CANAL COALITION,

Respondent/Intervenor.

PETITIONER HOOD CANAL SAND & GRAVEL LLC'S REPLY BRIEF

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I. INTRODUCTION

Hood Canal’s mining operation is a ‘water-dependent use’ under the plain definition in the Shoreline Management Act (“SMA”) guidelines. State law—the SMA and the Growth Management Act (“GMA”)—mandates that water-dependent uses be given priority on shorelines. However, Jefferson County (“County”) revised a section of its Shoreline Master Program (“SMP”) to prohibit marine transport of minerals in the Conservancy environment. This outright prohibition improperly and directly contradicts State law’s prioritization of water-dependent uses as it applies to Hood Canal and as such, the Western Washington Growth Management Hearings Board erred in its decision. Hood Canal requests that this Court vacate the Board’s decision and invalidate the Jefferson County SMP for remand to the County.

II. ARGUMENT

A. Hood Canal’s Mining Operation is a Water-Dependent Use as Defined by the SMA Guidelines.

The SMA Guidelines provide definitions for water dependent use as opposed to water related use. “Water-dependent use” means a use or portion of a use that requires direct contact with the water and cannot exist at a nonwater location due to the intrinsic nature of its operations.¹ “Water-related use” means a use or portion of a use that is not intrinsically dependent on a waterfront location but depends upon a waterfront location for economic viability...”²

¹ JCC 18.25.100(23)(c).

² JCC 18.25.100(23)(g).

Under the plain language of these definitions, Hood Canal’s mining operation clearly constitutes a water-dependent use. This is supported by a close reading of the facts in the *Preserve Our Island* case, contrary to what Respondents would have this Court believe.³ The *Preserve Our Island* Court determined that the mine operation in that case, called Glacier, was a water-dependent use not because it was located on an island, but rather because a waterfront location was integral to its operations.⁴ As Hood Canal more fully explained in its Opening Brief, Glacier had transported the aggregate by truck for over 30 years, and was seeking to reactivate its long-abandoned barge-loading facility.⁵ Because the County had designated the mine as a commercially significant mineral resource that needed access to marine transport of its aggregate, even though Glacier had trucked that very same aggregate off the island for decades, the Court held Glacier’s operations were water-dependent.⁶

Hood Canal similarly needs to move its materials by water. Marine transport is a “use or portion of a use” of the Hood Canal mining operation pursuant to the definition of water-dependent use.⁷ In parallel, there is no dispute that a marine loading facility is required for marine transport.

Respondents’ attempts to distinguish the uncanny similarities between the case at hand and *Preserve Our Island* are inapposite. Respondents

³ *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 137 P.3d 31 (2006), as amended (May 15, 2007), *supra*.

⁴ *Id.*, 133 Wn. App. at 526.

⁵ *Id.*, 133 Wn. App. at 509.

⁶ *Id.*, 133 Wn. App. at 525.

⁷ JCC 18.25.100(23)(c).

Coalition and County also attempts to distinguish *Preserve Our Island* by arguing that Glacier's mining operation could only be commercially significant because it was located on an island, and incorrectly alleging that Hood Canal's operation is not dependent upon water transport.⁸ Ecology claims that the Glacier mine in *Preserve Our Island* was in "stark contrast" to Hood Canal's facility because Glacier's market "was limited to the island on which it was located."⁹ That comparison does not stand up when the *Preserve Our Island* Court's decision is scrutinized. As the Court clearly explained in *Preserve Our Island*, Glacier had been transporting aggregate by water *and truck* for over 30 years.¹⁰

The Court's determination of water-dependency was due to the intrinsic nature of water transport to the *overall mining operation*, not whether it was the *only means of delivery*. The question of water-dependency is not whether the marine facility is its *sole* option; rather the question is whether the marine facility is so integral to the overall mining operation that to be a commercially significant mineral resource it needs access to marine transport of its aggregate. Just as is the case with Hood Canal, Glacier's mining operations as a whole may have been the principal use, but the transportation of aggregate is such an essential part of the mining operation that "a barge-loading facility is necessary for the mine 'to operate consistent

⁸Brief of Jefferson County ("County's Brief"), p. 45; Hood Canal Coalition's Reply Brief ("Coalition's Brief"), p. 21.

⁹Department of Ecology's Response Brief ("Ecology's Brief"), p. 46, footnote 49.

¹⁰*Id.*, 133 Wn. App. at 510

with its designation as a mineral land of long term commercial significance.’’¹¹

In fact, the *Preserve Our Island* Court explicitly explained that the definition of “water-dependent use” applies even if it pertains only to a portion of the overall use.¹² In this case, as with Glacier’s loading facility, Hood Canal must be able to move its material by water. Despite the other parties’ unsubstantiated contention otherwise, the evidence in the record clearly shows that Hood Canal is commercially reliant on marine transport. Just as marine transport was essential to Glacier, a marine transport facility is a fundamental necessity to Hood Canal’s mining operation. As such, despite the peripheral arguments by the Coalition, the County, and Ecology, the answer to this central question is that Hood Canal’s mining operation is a water-dependent use as defined under the SMA Guidelines and Washington case law.

B. The SMA and the GMA Mandate Priority Status for Water-Dependent Uses on Shorelines.

Ecology argues that Hood Canal Sand and Gravel fails to address the test set forth in WAC 173-26-211(3)(a) for consistency. Yet this is precisely Hood Canal Sand and Gravel’s point: the SMP is inconsistent with the GMA and the SMA when it comes to water-dependent uses. The GMA mandates that the SMP be consistent with the GMA, and the regulations and policies

¹¹*Id.*, 133 Wn. App. at 518.

¹²*Id.* at 518.

adopted pursuant thereto.¹³ By specifically banning outright transportation of minerals via water within the Conservancy designation, the SMP directly conflicts with the mandates of the SMA and the GMA.

Under the SMA, shoreline use must give priority to industrial and commercial developments which are particularly dependent on their proximity to or use of the State's shorelines.¹⁴ State law also requires that SMPs include an economic development element for the design and location of industries such as statewide significant projects, transportation facilities, and commerce or other developments that are particularly dependent of their shoreline locations or use thereof.¹⁵ At the same time, the GMA unequivocally requires the County's adopted comprehensive plan and implementing regulations to be consistent with the comprehensive plan, including designating mineral resource lands and conservation of such lands.¹⁶

These clear requirements in State law were recognized and reinforced by the Court in *Preserve Our Island*. There, the Court analyzed the Glacier mine's designation as mineral resource lands and corresponding importance of the designation under the GMA.¹⁷ The Court went through this level and type of analysis in order to determine whether Glacier's use was water-dependent and thus entitled to priority under the SMA and the GMA.

¹³RCW 36.70A.480; see also *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 524, 137 P.3d 31, 42 (2006), *as amended* (May 15, 2007).

¹⁴ RCW 90.58.020.

¹⁵ RCW 90.58.100(2)(a).

¹⁶*Pres. Our Island*, 133 Wn. App. at 520-21.

¹⁷ *Id.* at 521.

Respondents argue that while Hood Canal’s marine facility would be located within the shoreline Conservancy designation, its mining operation is upland and within the Mineral Resource Land Overlay, or “MRLO.”¹⁸ This issue is also parallel with *Preserve Our Island*. There, Glacier’s commercially significant mining operation was upland from its proposed shoreline marine facility in an area that the County had designated as a mineral resource.¹⁹ *Preserve Our Island* appellants similarly argued that the site’s mineral designation did not necessarily mean its principal use was a commercially significant mining operation. The Court disagreed, saying “that is exactly what it means”:

The barge-loading facility falls under the SMA and Master Program because it is located in a shoreline environment, and it must comply with their provisions. To this end, both the shoreline and GMA policies and regulations permit the County to impose conditions that will eliminate or diminish environmental impacts. But this does not change the designation of the Glacier site’s principal use as a commercially significant mining operation under the GMA, Comprehensive Plan, and Zoning Code. Because it cannot be a commercially significant mineral resource land without the barge facility, it is a water dependent use under the applicable requirements for shoreline developments. If the County wants to prohibit commercially significant mining as the principal use, it must do so directly through a zoning change, not by interpreting its Master Program to create conflicts in violation of RCW 36.70A.480(3) and .040(4).²⁰

¹⁸ Coalition Brief, p. 23; County’s Brief, p.46, Ecology’s Brief, p. 45.

¹⁹ *Pres. Our Island*, 133 Wn. App. at 525.

²⁰ *Id.* (internal citations omitted).

Respondent County further argues that a more apt case is *Department of Ecology v. Hama Hama*.²¹ Yet, just as the *Preserve Our Islands* Court found *Hama Hama* inapplicable, it is distinguishable here as well:

Hama Hama was decided in 1976, shortly after the SMA was adopted and long before the GMA and its resource use policies became law. Finally, the Board's decision in that case did not consider any of the myriad mitigation measurements included here. The Board correctly ruled that Glacier's proposed barge-loading facility is a water dependent use.²²

Where the *Preserve Our Island* Court analyzed the SMA and the GMA in conjunction with Glacier's designation for permitting purposes, here, similarly, this Court must properly consider the SMA and the GMA in analyzing Hood Canal's water-dependent use, its Conservancy designation, and priority to use the shoreline to determine the propriety of the County's prohibition of marine transport in the Conservancy area. In their various ways, the Coalition, the County, and Ecology mistakenly argue that this ban is lawful because the County has authority to make whatever prohibitions it wishes and the County's SMP does not need to be consistent with the SMA and the GMA. However, these arguments contradict the careful analysis on this very issue that the *Preserve Our Island* Court went through. Both the SMA and the GMA require the County to give preference and priority to water-dependent uses.

²¹ SHB No. 115 (1976).

²² *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 527. 137 P.3d 31, 43 (2006), as amended (May 15, 2007).

C. As a Water-Depended Use, Hood Canal's Mining Operation must be Given Priority and as Such, Cannot be Outright Prohibited.

As Hood Canal explained in its Opening Brief and above, its mining operation is properly considered as a water-dependent use entitled to priority under the SMA and the GMA. The policy of RCW 90.58.020 gives preference to certain uses for shorelines of statewide significance, must be followed and complied with.

Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, **industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state** and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.²³

This same section of the SMA gives priority “for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.”²⁴

In turn, RCW 90.58.100 requires that:

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, projects of statewide significance, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state...²⁵

²³ RCW 90.58.020 (emphasis added).

²⁴ *Id.*

²⁵ RCW 90.58.100(2).

Thus, because Hood Canal’s mining operation requires marine transport, the County’s outright prohibition of marine transport contradicts the SMA and these particular sections that Respondents cite.

Though Respondents acknowledge the SMA’s prioritization of certain uses, they focus their arguments on the contention that the County has the authority to enact an SMP that conflicts with this very prioritization. The County does not have unlimited authority to enact whatever legislation as a matter of politics or public pressure. The County must follow statutory mandates, including the SMA and the GMA. Because the County’s adopted legislation—an outright ban of marine transport in the Conservancy area—is not consistent with the SMA and the GMA, the Board erred in affirming this legislation.

The Respondents over inflate the County’s authority to enact legislation. Respondents argue that the County can prohibit water-dependent uses in certain portions of its jurisdiction, even within the Conservancy shoreline environment, but no Respondent ever identifies the source of that alleged authority.²⁶ These blanket statements conflict with the absolute requirement that the County adopt development regulations that are consistent and in harmony with its comprehensive plan and the GMA.²⁷

Ecology cites four cases to support its position. However, as discussed below, these cases do not support Respondents’ position that the

²⁶ Coalition’s Brief, p. 3; Brief of Jefferson County (“County’s Brief”), p. 47; Department of Ecology’s Response Brief (“Ecology’s Brief”), p. 42.

²⁷ *Pres. Our Island*, 133 Wn. App. at 523.

County may adopt legislation even if such legislation is inconsistent with the SMA and the GMA.

Ecology's first case is *Samson v. City of Bainbridge Island* does not support Respondents' arguments because it did not deal with an outright ban. *Samson* dealt with waterfront property owners' challenge to that City's SMP, which limited some types of dock and pier development within Blakely Harbor.²⁸ In *Samson*, the Court noted that the City did not prohibit all docks in the harbor but had thoughtfully chosen a balance to comply with the guidelines and priorities of the SMA.²⁹ The Court emphasized the importance and applicability of the SMA and the GMA (comprehensive plan) in its review of the City's SMP.³⁰ In contrast to *Samson*, here, Jefferson County used its SMP to impose an outright ban on all marine transport in the Conservancy area, ignoring the SMA and its priorities altogether.

Ecology's three other cited cases are also inapposite to the factual situation at hand because they concern individual permits and whether those are consistent with an adopted SMP. The legal issues in these cases pertain to whether the local jurisdiction may properly deny permitting of residential homes and private docks when such construction were found to be non-compliant with the jurisdictions' SMPs.

In *Buechel v. State Dept. of Ecology*, the Court affirmed the Shoreline Hearings Board's denial of a land use permit and variance from zoning

²⁸ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334, 344 (2009).

²⁹ *Id.* at 51.

³⁰ *See, e.g. Id.*

regulations because the Court found that the decision was not clearly erroneous.³¹ Unlike *Buechel*, the instant case does not pertain to the permitting process or denial of a permit. The *Buechel* case is, however, confirmation that conformance with the SMA is an absolute requirement, including for local governments to develop regulations (SMPs) in accordance thereof.³²

In *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.*, the Court affirmed the shoreline hearings board's denial of a shoreline substantial development permit to build a 345-foot dock over partly public tidal mudflats because it found that the applicant did not meet its burden to prove that the dock proposal was consistent with **both** the SMA and the local jurisdiction's SMP. Therefore, the board's finding that existing boat launching access was adequate and feasible was not arbitrary or capricious.³³ *Bellevue Farm* is also inapposite since it dealt with denial of a permit rather than an SMP's inconsistency with the SMA.

In *Lund v. State Dep't of Ecology*, the Court analyzed the issues against the SMA.³⁴ *Lund* concerned denial of a conditional use application to build a single family residence over water when such construction would be prohibited by the jurisdiction's SMP.³⁵ The *Lund* Court looked at the policies and purpose of the SMA, and the Legislature's intent in them, to conclude

³¹ *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 884 P.2d 910, 913 (1994).

³² *Id.* at 203.

³³ *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.*, 100 Wn. App. 341, 359, 997 P.2d 380, 386 (2000).

³⁴ *Lund v. State Dep't of Ecology*, 93 Wn. App. 329, 337, 969 P.2d 1072, 1076 (1998).

³⁵ *Id.*

that the conditional use did not warrant priority, versus whereas here, there is clear prioritization given to Hood Canal's water dependent use.³⁶

Contrary to Respondents' arguments, the foregoing cases all pronounce that state laws, such as the SMA and the GMA, must be followed and do not grant unfettered authority to local jurisdictions' adoption of their SMPs.

These cases actually support Hood Canal's position that the County's SMP cannot blatantly disregard the SMP's prioritization of Hood Canal's water-dependent use. Instead, the SMP should have harmonized this prioritization because Hood Canal falls under the category of "an economic development element for the location and design of industries, projects of statewide significance ... commerce and other developments that are particularly dependent on or use of the shorelines of the state."³⁷ The County failed to do so, and the Board compounded this error in also failing to recognize the chaos created by such inconsistency. Thus, in considering the County's legislative outright ban on marine transport in the Conservancy area, this Court should conclude that this ban is inconsistent with the SMA and the GMA.

D. The County Committed Procedural Errors that Deprived Hood Canal of Its Due Process Rights.

As the County acknowledges, the "creation of a complex set of land use regulations such as a Shoreline Master Program is an iterative process,

³⁶ *Id.*

³⁷ RCW 90.58.100(2)(a).

during which changes will be made based on input received from agencies and others” and requires “extensive public process leading up to the approval of the final SMP.”³⁸ As such, it is an especially egregious violation of Hood Canal’s due process rights that the County inserted the prohibition on marine transport after all public hearings and opportunity for comments had closed.

The County urges this Court to ignore its public participation errors because the Board concluded that Hood Canal’s prior counsel did not adequately brief the Board. Yet the Board clearly had enough briefing to substantively address Hood Canal’s concerns since the Board discussed the County’s public process when addressing the issue.³⁹ It is ironic that the County argues that this Court should not review its lack of public process given the marine transport prohibition, yet recognizes that the Board did, in fact, address the County’s public process.⁴⁰ The Board improperly rejected Hood Canal’s public participation concerns by relying on the County’s ample public process given to the public on all other aspects of the SMP. The Board failed to connect the dots and recognize that the County’s ample process given to other SMP considerations should also have been extended to the marine transport issue.

The record undisputedly shows that the marine transport prohibition was included in the SMP without notice to the public and that it was not part of any materials prepared by staff, reviewed by the planning commission or

³⁸ County’s Response, p. 49.

³⁹ FDO at 87-88.

⁴⁰ Id.


stakeholders groups, addressed at a public hearing, or made available for public comment. Hood Canal briefed these public participation and procedural due process errors in its Opening Brief. None of the Respondents substantively defend the County's procedural errors and the deprivation of procedural due process. These procedural and due process issues are properly before this Court and without any counter arguments, there is no dispute that the County committed procedural and due process errors in its adoption of the SMP that bans marine transport.

III. CONCLUSION

Based on the above and the evidence in the record, Hood Canal respectfully requests that this Court vacate the Board's decision in Case No. 14-2-0008c; enter an order finding the County's SMP is out of compliance and/or invalid and remand this matter to the County with instructions; and award any other relief that this Court deems right and just under the circumstances.

DATED this 27th day of May, 2016.

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OLYMPIC STEWARDSHIP FOUNDATION; J. EUGENE FARR;
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BUD and VAL SCHINDLER; RONALD HOLSMAN; CITIZENS'
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) ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga Koloušková PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date, I caused to be served via Email and U.S. First Class Mail, true and correct copies of: PETITIONER HOOD CANAL SAND & GRAVEL'S REPLY BRIEF and this AFFIDAVIT OF SERVICE, upon all counsel and parties of record at their addresses listed below.

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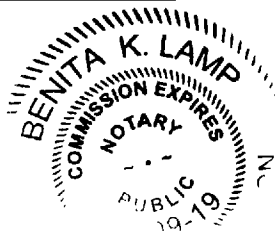
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Hearings Board*

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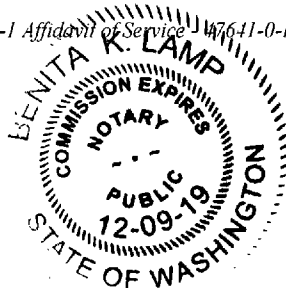

Evanna L. Charlot

SIGNED AND SWORN to (or affirmed) before me on May 27, 2016, by
Evanna L. Charlot.



B. K. Lamp
Benita K. Lamp
Notary Public Residing at Renton WA
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